13

Story

Stimson

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~410.~~ 183

JOHN RICHEY, PLAINTIFF,

vs.

JOHN S. WILLIAMS, COLLECTOR OF INTERNAL REVENUE, ETC.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED DECEMBER 29, 1869.

1 UNITED STATES OF AMERICA,
District of Indiana, ss:

At a circuit court of the United States, begun and held at Indianapolis, for the district of Indiana, on Tuesday, the fourth day of May, 1869:

Present, the Honorable David Davis, associate justice of the Supreme Court of the United States, and the Hon. David McDonald, judge of the district court of the United States for the district of Indiana.

JOHN RICHEY
v. } 1557.
JOHN S. WILLIAMS.

This is an action of assumpsit, brought to recover money had and received by the defendant to the use of the plaintiff, as is alleged.

2 On the fifth day of January, 1869, the plaintiff filed his declaration in this behalf.

And afterwards, to wit, on the day first aforesaid, the defendant filed his special plea in bar to said declaration.

Whereupon the plaintiff filed a general demurrer to said special plea, and the defendant joined in demurrer.

And this cause coming on to be argued on said demurrer and joinder, it occurred as a question to be decided, whether if the plaintiff's stock in the Lafayette and Indianapolis Railroad Company, described in the declaration and plea, was, on the first day of January, 1867, worth only $37 50 per share, making his whole 84 shares thereof worth only $3,140, as alleged in said plea; and if the bonds mentioned in in said plea, and therein alleged to have been received in said year for said stock were, when the same were received, and within that

3 year, worth $15,750, as alleged in the plea, ought the difference between said value of said stock, and said value of said bonds, amounting to $12,610, to have been regarded as gain, profit, or income of the plaintiff within the meaning of the internal revenue law in force, when the tax mentioned in the declaration was assessed so as to render said sum of $12,610 or any part thereof taxable as income against the plaintiff.

On which question the opinions of the said judges were opposed.

Whereupon motion of the plaintiff, by his counsel, in order that the point on which the disagreement hath happened, may during the term be stated under the direction of the judges, and certified under the seal of the Supreme Court of United States to be finally decided, it is ordered that the said declaration and special plea, and said de-

4 murrer and joinder, together with this entry on the order book of said circuit court, be copied into a transcript thereof, and duly certified under the seal of this court, by the clerk thereof, to the Supreme Court of the United States for its final judgment and decision on the question aforesaid.

And this cause is continued in this court to await the said final decision and judgment.

Here follows said declaration, to wit:

"UNITED STATES OF AMERICA, *State of Indiana:*

"In the circuit court of the United States, district of Indiana, November term, 1868.

John Richie, a citizen of the State of Indiana, plaintiff, complains

of John S. Williams, (collector of internal revenue for the eighth district of Indiana, under the provisions of an act of Congress of the United States, entitled 'An act to provide internal revenue to support the government, and to pay interest on the public debt,' approved July 1st, 1862, and the several acts supplementary thereto and
5 amendatory thereof,) defendant, of a plea of trespass on the case upon promises:

"For that whereas heretofore, to wit, on the first day of January, 1853, at the district aforesaid, the Lafayette & Indianapolis Railroad Company was a body politic and corporate, duly authorized under the laws of said State, with a capital stock of $245,000, and the plaintiff was then and there, and from thence to the 8th day of January, 1867, continued to be, the owner of eighty-four shares of said stock of fifty dollars each, making in all the sum of $4,200 00.

"And whereas, also, the said railroad company was on the day and year first aforesaid, at the district aforesaid, the owner of a railroad leading from the city of Lafayette to the city of Indianapolis in said State, 64 miles in length, with its appurtenances and equipments of great value, to wit, of the value of two millions of dollars; and was then and there en-
6 gaged in running and operating the said railroad, and continued to run and operate the same until the 8th day of January, 1867, whereby said company made and received large profits annually, from which gains and profits the whole cost of constructing said railroad and its appurtenances and equipments was fully paid.

"And the plaintiff avers that afterwards, to wit, on the 10th day of June, 1866, at the district aforesaid, the said railroad company entered into negotiations with the Indianapolis and Cincinnati Railroad Company (said last-named company being then and there also duly organized as a corporation under the laws of the said State) for the consolidation of the said corporations pursuant to the laws of said State; and afterwards, to wit, on the 8th day of January, 1867, at the district aforesaid, the said two corporations, by the execution and ratification of articles of consolidation, became and were one corporation, and still
7 remained such, under the name and style of the Indianapolis, Cincinnati & Lafayette Railroad Company.

"And the plaintiff further avers that it was then and there, to wit, on the day and year last aforesaid, at the district aforesaid, by said articles of consolidation, agreed between the said two railroad companies that said Indianapolis, Cincinnati & Lafayette Railroad Company should, for and in consideration of the surrender of the stock of the said Lafayette & Indianapolis Railroad Company by the owners thereof to one William F. Reynolds, as trustee, issue to the said Reynolds, as trustee, 2,500 bonds of one thousand dollars each, payable in 30 years, with interest at 7 per centum per annum, payable semi-annually in the city of New York.

"And the plaintiff further avers that afterwards, to wit, on the 1st day of February, 1867, at the district aforesaid, in pursuance of said agreement, the said Indianapolis, Cincinnati & Lafayette Railroad
8 Company made under the corporate seal thereof and delivered to the said Reynolds, as trustee as aforesaid, 2,500 bonds of one thousand dollars each, payable in 30 years in the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually.

"And the plaintiff further avers that afterwards, to wit, on the 1st day of August, 1867, at the district aforesaid, the plaintiff surrendered the certificate for his said 84 shares of stock in said first-named corpo-

ration, and received on account thereof from the said Reynolds, as trustee as aforesaid, 21 of said bonds, of the nominal value of $21,000, but of the real value of not to exceed 14,700.

"And the plaintiff further avers that afterwards, to wit, on the day of June, 1868, one Thomas W. Fry was the assessor of internal revenue for the said eighth district of Indiana under and by virtue of said several acts of Congress, in which said district the said plaintiff then and there resided and still does reside, and said Fry, as
9 such assessor as aforesaid, then and there assessed against said plaintiff as and for his income for and during the year 1867, for and on account of the surrender of said 84 shares of stock to said Reynolds, as trustee as aforesaid, and the receipt on account thereof by the plaintiff of said 21 bonds, a large sum, to wit, the sum of ten thousand nine hundred and fifty-four dollars, and then and there assessed a tax thereon against the plaintiff of five hundred and forty-seven dollars and seventy cents.

"And said plaintiff further avers that afterwards, to wit, on the day of July, 1868, at the district aforesaid, the said Fry, as such assessor as aforesaid, made out and delivered to the said defendant, as collector as aforesaid, a list of the said assessment and tax for collection from the plaintiff.

"And the plaintiff further avers that afterwards, to wit, on the 25th day of August, 1868, at the district aforesaid, the plaintiff was the owner of a large amount of real and personal property, to wit, of the value of twenty thousand dollars, and the said defendant then and
10 there was about to distrain, seize, and sell the same, or so much thereof as might be necessary to make the said tax so assessed against the plaintiff as aforesaid, whereupon the said plaintiff duly appealed from the said assessment, so made by the said Fry as aforesaid, to the Commissioner of Internal Revenue, and alleged said assessment to be erroneous and illegal, upon which said appeal said Commissioner of Internal Revenue afterwards, to wit, on the day and year last aforesaid, affirmed said assessment.

"And the plaintiff further avers that afterwards, to wit, on the 19th day of December, 1868, at the district aforesaid, the plaintiff was still the owner of the property aforesaid, and the said defendant then and there threatened, and was about to distrain, seize, and sell the same, or so much thereof as might be necessary to make the said tax and the costs of such sale, whereupon the said plaintiff, not voluntarily, but under protest against the legality of the assessment of income and his liability to pay the said tax thereon, and for the sole pur-
11 pose of averting such distraint, seizure, and sale, paid to the said defendant, as such collector as aforesaid, the said sum of 547 70, and then and there notified the said defendant that he should sue him for the recovery thereof as being a tax illegally assessed and collected.

"The plaintiff further avers that said Lafayette & Indianapolis Railroad Company, at all times after the 1st day of July, 1862, to the time of the consolidation aforesaid, duly paid to the United States all taxes and assessments for and on account of the earnings and receipts of said company, and on account of dividends to stockholders therein, as required by law, being in all a large sum of money, to wit, $50,000.

"And the plaintiff further avers that said assessment and tax, so assessed and levied by the said Fry as such assessor as aforesaid, and so collected by said defendant, as such collector as aforesaid, of and from the plaintiff, were and are wholly erroneous and illegal;
12 and the said defendant, upon the payment thereof to him in

manner aforesaid, became and was then and there liable to repay the plaintiff the said sum of money, to wit, five hundred and forty-seven dollars and seventy cents, and being so liable, he, (the said defendant,) in consideration thereof, afterwards, to wit, on the said 19th day of December, 1868, at the district aforesaid, undertook and faithfully promised the plaintiff to pay him the said sum of money last above mentioned when he, the said defendant, should be thereunto afterwards requested.

"Nevertheless the said defendant, not regarding his said promise and undertaking, but contriving to cheat and defraud the plaintiff in this behalf, did not, nor would afterwards, to wit, on the 28th day of December, 1868, at the district aforesaid, though then and there thereunto specially requested, pay the said plaintiff the said sum of money last above mentioned, or any part thereof; but he to pay the same hath hitherto wholly neglected and refused, and still does neglect and refuse, to the plaintiff's damage one thousand dollars; hence he sues.

13 "McDONALD, ROACHE & McDONALD,
"And CHASE & WILSTACH, *Att'ys for Plaintiff.*"

Here follows said plea:

"1. Comes the said defendant, by his attorneys, and defends the wrong and injury, when, etc.; and for a plea herein says that he did not undertake and promise in manner and form as the said plaintiff hath above declared thereof against him; and of this he puts himself upon the country.

"2. And for a further plea herein, said defendant says that on the said 19th of June, 1866, and from thence until said 8th day of January, 1867, said Lafayette and Indianapolis Railroad Company, and said Indianapolis and Cincinnati Railroad Company, owning and operating railroads respectively as in said declaration mentioned, were railroad corporations existing and operating respectively under special charters heretofore granted to them by the general assembly of the State of Indiana;

14 that the capital stock of the said first-named company was $245,000, as stated in said declaration, divided into shares of fifty dollars each; that the capital stock of said Indianapolis and Cincinnati Railroad Company was $; also divided into shares of fifty dollars each; that the shares of the capital stock of each said corporation were by the charter thereof and the laws of said State made and declared to be personal property; and that upon and after said consolidation of said companies, by operation of said laws, the shares of the capital stock of said consolidated corporation became and were personal property.

"Said defendant says that on the first day of January, in the year 1867, said eighty-four shares of the capital stock of said Lafayette and Indianapolis Railroad Company held and owned by said plaintiff, as in said declaration mentioned, were of the reasonable value in the market of thirty-seven dollars & fifty cents for each share thereof,

15 and no more.

"And defendant says that in and by said articles of consolidation it was, among other things, stipulated and agreed by and between said two companies that they should intersect, join, and unite their said railroads at the city of Indianapolis, in said State, thus forming one continuous railroad between said city of Lafayette and the point of the southeastern terminus, on the State line of said Indianapolis and Cincinnati railroad, passing through said city of Indianapolis, and that they should

merge and consolidate the stock of said respective corporations, making one joint stock company of the two railroads thus connected, in accordance with the laws of said State; that said consolidated corporation should be known as the Indianapolis, Cincinnati and Lafayette Railroad Company; that its capital stock should be fixed at the aggregate amount of the capital stock of said constituent corporations, divided into
16 shares of fifty dollars each; that all the stock in said respective companies should become stock in the consolidated company by the mere force of said agreement; and that each stockholder in either having any number of shares should become stockholder with the same number of shares in the consolidated company. But it was therein further provided in substance and effect that said consolidated corporation should, immediately after its existence might begin, issue and deliver to one William F. Reynolds, as agent and trustee in that behalf of said Lafayette and Indianapolis Railroad Company, and its stockholders, its corporate bonds to the aggregate amount of two millions five hundred thousand dollars, secured by mortgage on the consolidated road and property; that said Reynolds should collect all claims due to said Lafayette and Indianapolis Railroad Company, and that out of such moneys, and also out of said bonds or their proceeds he should
17 pay: 1st. All the expenses incident to said trust; 2d. All debts or liabilities of every kind of said last-named railroad company; 3rd. That the remainder thereof should be returned to said consolidated company, or paid over the stockholders of said Lafayette and Indianapolis Railroad Company, at their option, upon the following conditions, viz: That all said stockholders respectively, or any one or more of them, might at his or their option surrender his or their stock to said trustee for the benefit of said consolidated company, and in lieu thereof receive from said trustee such proportion of said residue as the number of shares owned by any such stockholder should bear to the whole number of shares of stock. And it was further by said articles provided, that said stockholder might have the space of one year from the time said consolidation should take effect, within which to elect, to sell, and surrender their stock on the terms aforesaid, and that, failing within that time to make election to sell, they should be deemed to have elected to retain their stock in said consolidated corporation.

18 "The defendant says that said consolidation and the terms and conditions thereof were made in accordance with the assets previously given of said plaintiff.

"And defendant further says that after becoming a stockholder to the amount of eighty-four shares in said consolidated company by the operation of said articles and agreement of consolidation, to wit, on the 1st day of August, 1867, said plaintiff elected to sell and surrender his said stock on the terms and conditions aforesaid, and thereupon surrendered his certificates therefor and received from said Reynolds, as such trustee, the said twenty-one bonds of said consolidated company, amounting in the aggregate to the said sum of $21,000, as and for a part of the sum to which he would be entitled under the arrangement aforesaid.

"Defendant says that the said twenty-one bonds were made payable to the bearer thereof, and were negotiable by delivery as according to the law merchant, and that they were so received by him in part payment for said stock, and as and for so much money, and that they
19 were worth $15,750 00; that said plaintiff wholly failed to make to the proper assessor or assistant assessor of his said district, within the time prescribed by law, or at any other time, any return whatever of said gains and profits, or any part thereof, derived by him

from said sale of said stock; and that thereupon said assessor proceeded, as he was by law required to do, to assess the same, and did so assess the same, to wit, on the day of July, 1868, at the district aforesaid, which is the same supposed assessment in said declaration mentioned, and not other or different.

"And said defendant says that no part of said gains, profit, and income so received by said plaintiff upon said sale and surrender of said stock had ever been assessed against said plaintiff or said railroad company, nor any tax paid thereon, except as the same was so assessed against said plaintiff, and by him paid, as in the declaration mentioned. And this he is ready to verify.

"Wherefore, &c.

"HENDRICKS, HURD & HENDRICKS,
"*Att'ys for Def't.*"

Here follow said demurrer and joinder:

20 "And the said plaintiff, as to the second plea by the defendant above pleaded, says that the same and the matters and things therein stated and set forth are not sufficient in law to bar or preclude the said plaintiff from having and maintaining his aforesaid action thereof against the said defendant.

"McDONALD & ROACHE, &
"CHASE & WILSTACH,
"*Att'ys for Pl'ff.*

"And said defendant now joins in demurrer.

"HENDRICKS, HURD & HENDRICKS,
"*For Def't.*"

21 IN THE DISTRICT OF INDIANA,
United States of America:

I, John D. Howland, clerk of the circuit court of the United States in and said district, and in and for the seventh judicial circuit of the United States, do hereby certify that the above and foregoing is a full, true, and [and] complete copy and transcript of the certificate of the opposition of the honorable the judges of said court in their opinions in the cause above entitled; and also of the declaration, special plea, demurrer, and joinder in said cause ordered to be certified hereunto.

Witness my hand and the seal of said court this 10th day of August, A. D. 1869.

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsement on cover:) No. 410. John Richey, plaintiff, vs. John S. Williams, collector of internal revenue, &c. Indiana C. C. U. S.
Filed 29th December, 1869.

NO. 410.

SUPREME COURT OF THE UNITED STATES.

JOHN RICHEY, PLAINTIFF,

VS.

JOHN S. WILLIAMS, COLLECTOR, &c., DEFENDANT.

BRIEF OF McDONALD & ROACHE,

ATTORNEYS FOR PLAINTIFF.

NO. 410.

SUPREME COURT OF THE UNITED STATES.

JOHN RICHEY, PLAINTIFF,

vs.

JOHN S. WILLIAMS, COLLECTOR, &c., DEFENDANT.

BRIEF OF McDONALD & ROACHE,

ATTORNEYS FOR PLAINTIFF.

This cause is pending in the Circuit Court of the United States for the District of Indiana, and the question before the Supreme Court arises upon the opposed opinions of the Judges below in considering the demurrer to the second plea pleaded by the defendant Williams. That question is stated in the record as follows:

"Whether if the plaintiff's stock in the Lafayette and Indianapolis "Railroad Company, described in the declaration and plea, was, on "the first day of January, 1867, worth only $37.50 per share, making "the whole eighty-four shares thereof worth only $3,140, as alleged "in said plea; and if the bonds mentioned in said plea, and therein "alleged to have been received in said year for said stock were, when "the same were received, and within that year, worth $15,750, as "alleged in the plea, ought the difference between the said value of "said stock, and said value of said bonds, amounting to $12,610, to "have been regarded as gain, profit, or income of the plaintiff, "within the meaning of the internal revenue law, in force when the "tax mentioned in the declaration was assessed, so as to render said

"sum of $12,610, or any part thereof, taxable as income against the "plaintiff."

To enable this Court to determine that question, the Court below ordered the declaration, special plea, demurrer, and joinder in demurrer, to be incorporated into the record certified up; and therefore all of the allegations of the declaration not traversed by the plea, as well as the additional facts stated in the plea, will have to be considered.

The purpose of this suit, as the Court will see, is to recover back money paid under protest, on an assessment for alleged "gains, profit, or income," claimed to have been illegally assessed against the plaintiff.

From the pleadings in the record it appears that the plaintiff, John Richey, subscribed for eighty-four shares of stock, of fifty dollars each, in the Lafayette and Indianapolis Railroad Company some time in the year 1853, at the par value, amounting to $4,200. That the whole amount of the capital stock of the company, at the par value, was $245,000, and that this stock represented a railroad, fixtures and equipments, sixty-four miles in length, extending from Lafayette to Indianapolis, in the State of Indiana, of the value of at least two millions of dollars—all of which was fully paid for and the corporation was out of debt. That in June, 1866, this railroad company consolidated with the Indianapolis and Cincinnati Railroad Company, both being Indiana corporations; and that by the terms of the consolidation, two millions five hundred thousand dollars of bonds were to be issued by the consolidated company and placed in the hands of William F. Reynolds as a trustee, as also the moneys, rights, credits and effects of the Lafayette and Indianapolis Railroad Company, except road beds, depots, depot grounds, equipments, and franchises. That out of the means thus placed in his hands, Reynolds was to pay all of the debts and liabilities of the Lafayette and Indianapolis Railroad Company, if any, and the balance of the bonds and moneys, if any remained, were to be by him divided among such of the stockholders of said company as should, within the year, assign their stock for the benefit of the consolidated company, but the distribution should be on the basis of the whole stock, *pro rata*. Richey assigned, as did all of the stockholders of the old company, and Reynolds, in August, 1867, gave him, in pursuance of the agreement of consolidation, twenty-one bonds of one thousand dollars each, payable to bearer, due in thirty years, and bearing seven per cent. interest. The plea avers that, on the first of January,

1867, the eighty-four shares of stock were "reasonably worth in the "market but thirty-seven dollars and fifty cents per share, and that "the twenty-one bonds received in exchange for them were, on the "first day of August, 1867, (the day on which they were received,) "worth $15,750, making the assumed difference in value between "the stock and bonds, at the dates above mentioned, $12,610," and this assumed difference presents the question submitted by the Court, being the amount upon which the plaintiff was assessed an income tax as gains, profits or income for the current year.

The section of the internal revenue law cited to support this assessment reads as follows: "There shall be levied, collected and "paid annually upon the *gains, profits* and *income* of every person, "whether *derived* from any kind of property, interest, dividend or "salaries, or from any profession, trade, employment or vocation, or "from any other source whatever, a tax of five per centum on the "amount so *derived* over one thousand dollars." * * * "That this tax be assessed, collected and paid upon the gains, prof- "its and income for the year ending the thirty-first day of December "next preceding the time for levying, collecting and paying said "tax."

Then follows an enumeration of certain specific sources of income, among which are included "profits *realized* within the year from "sales of real estate purchased within the year or within two years "previous to the year for which the income is estimated," concluding with the same general words as in the section first quoted. Acts March 2d, 1867, sect. 13.

The language of the law we admit is quite broad and sweeping—sufficiently so, it would seem, without extending it by a latitudinous construction. But broad as it is, it is not without some limit. It is a tax that is to be "annually" collected, and must be levied upon "income, gains or profits *derived*" from some kind of property, business or employment, and must be the gains, profits or income for the year ending the 31st of December next preceding the time for levying and collecting the same, except in the sales of real estate, and in that instance it may embrace the purchases of the year preceding that in which the sale is made. It is an income, gain or profit that has been "*derived*"- that is *realized* and *ascertained*, not *speculative* or *contingent*. The terms employed exclude any other construction, and to go beyond them would be to enter the limitless field of speculation and conjecture; we will not presume that the Court will do this, and will therefore discuss the question certified

in the record by giving to the operative words of the law their ordinary and obvious meaning, and shall admit that all income, gain or profit, from whatever source, that has been "*derived*" within the year, that is, that has been *realized* and ascertained, is within the statute. But we shall contend, on the other hand, that no assumed or speculative change in property or values can be made the basis of any assessment for income tax; that it requires something more than a mere change in the market value of property within the year, or an assumed difference in the value of property that has been received in exchange for other property, or change in the form of property, to "*realize*" or "*derive*" such gains, profits or income as will authorize the assessment of the tax. It cannot be contended that if A was the owner of stocks on the 1st of January and before the 31st of December, they should advance ten per cent. in price in the market, and he still remained the owner of them, that he could be charged with the advance in price as a gain "*derived*" from such stocks, nor could it be said that he had "*realized*" any profits from his investment; nor would an exchange of such stocks for other property of a greater market value subject him to a tax upon the assumed difference in value as an income, gain or profit for that year, for it would still depend upon the ultimate disposition of the property received in exchange for the stocks as to whether any profits were realized by the exchange or not. The fact that a party might make a profit by disposing of his property, can not be construed into a profit *realized*, so as to make him liable to an income tax upon such assumed gain. With this general reference to the law and its construction, we ask the Court to examine the facts in the record. In the beginning of the year 1866, the Lafayette and Indianapolis Railroad Company, with a capital stock of four thousand nine hundred shares of fifty dollars each, owned a road, with its rolling stock and fixtures, valued at two millions of dollars. Richey was the owner of eighty-four shares of this stock, subscribed by him at the time the road was being constructed, in 1853, which he has held ever since. This did not, it is true, make him in legal contemplation a part owner of the corporate property. That belonged to the corporation, the artificial person created by law; but it did entitle him to participate in the net profits of the corporation in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the *property* that might remain after the payment of its debts. Van Allen *vs.* The Assessors, 3 Wall, 573. While, therefore, he had no legal claim

upon the company for any share of the corporate property, yet, ultimately, on the dissolution of the corporation, he would be entitled to his *pro rata* share of such property, after the payment of its debts, and then the stock held by him would represent that share.

The consolidation effected the dissolution of the corporation. See Clearwater vs. Meredith, 1st Wallace, 25. In effect, the contract under which Richey received his bonds was a sale of the corporate property of the company for $2,500,000 of the bonds of the consolidated company, and the dividend made to him was the share of that property represented by his stock. It was just the property owned by him in the corporation, and no more, set free by the contract of consolidation, and unless we are utterly wrong in regard to the true construction to be given to the statute under which the assessment was made it is not liable to be so assessed.

Other questions may ultimately arise in this case in its progress in the Court where it is still pending, but as it now stands in the Supreme Court on the question certified, we do not deem it important to consider them. One of those questions we may refer to without discussing it, namely: Can an income tax be levied by the General Government in this form? Is not such a tax within the provision of that clause of section 8 of the Federal Constitution which declares: "No capitation or other direct tax shall be laid "unless in proportion to the census or enumeration hereinbefore "directed to be taken?" If this question should be decided by the Supreme Court in the negative, then no such assessment could be sustained, and as we are advised that the question is now under consideration in other cases, we have thought it not out of place to call the attention of the Court to it in this.

All of which is respectfully submitted.

J. E. McDONALD,
A. L. ROACHE,
Attorneys for Richey.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

JOHN RICHEY, *Plaintiff*,
vs.
JOHN S. WILLIAMS, *Collector of Internal Revenue, &c.* } No. 185.

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the District of Indiana.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

JOHN RICHEY, *Plaintiff*,
vs.
JOHN S. WILLIAMS, *Collector of Internal Revenue, &c.* } No. 185.

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the District of Indiana.

BRIEF FOR DEFENDANT.

This is a suit to recover the sum of $547 70, alleged to have been illegally assessed and collected as income tax, under the internal revenue laws, in the eighth collection district of Indiana.

The declaration, which was filed in the court below on the 5th of January, 1869, sets forth that on the 1st of January, 1863, and from thence to the 8th of January, 1867, plaintiff was the owner of 84 shares of stock in the Lafayette and Indianapolis Railroad Company, of $50 each, the whole amount of the capital stock of the company being $245,000; that on the 8th of January, 1867, the Lafayette and Indianapolis Railroad Company

and the Indianapolis and Cincinnati Railroad Company, by articles of consolidation, became one corporation, under the name and style of the Indianapolis, Cincinnati, and Lafayette Railroad Company; that by said articles it was agreed, that in consideration of the surrender of the stock of the Lafayette and Indianapolis Railroad Company by the owners thereof to a trustee, the Indianapolis, Cincinnati, and Lafayette Railroad Company should issue to said trustee 2,500 bonds of $1,000 each, payable in 30 years, &c., and that, in pursuance of this agreement, said bonds were made and delivered by the last-mentioned company to the trustee aforesaid; that on the 1st of August, 1867, the plaintiff surrendered his 84 shares of stock above mentioned, and received on account thereof from said trustee 21 of said bonds; that in June, 1868, there was assessed against him, as income for and during the year 1867, on account of the surrender of the stock and receipt of the bonds aforesaid, the sum of $10,954 on which was assessed a tax of $547 70; that in July, 1868, the assessor of said district made out and delivered to the defendant, as collector of the same district, a list of said assessment and tax for collection; that in August, 1868, plaintiff was the owner of a large amount of real and personal property, and the defendant was about to distrain, seize, and sell the same, or so much thereof as might be necessary to make the tax assessed as aforesaid, whereupon the plaintiff duly appealed from said assessment to the Commissioner of Internal Revenue,

who affirmed the assessment; that in December, 1868, plaintiff, not voluntarily, but under protest, and for the sole purpose of averting a threatened distraint and sale of his property, paid to the defendant, as collector, the said sum of $547 70, &c.; that said tax, so assessed and collected, was and is wholly erroneous and illegal, and that the defendant, upon payment thereof to him in manner aforesaid, became liable to repay the plaintiff the said sum of money, to wit: $547 70, &c.

To which was pleaded—

1st. The general issue.

2d. That on the 19th of June, 1866, and from thence until the 8th day of January, 1867, said Lafayette and Indianapolis Railroad Company, and said Indianapolis and Cincinnati Railroad Company owning and operating railroads respectively, &c., were railroad corporations existing and operating respectively under special charters heretofore granted to them by the general assembly of the State of Indiana; that the capital stock of the first-named company was $245,000, divided into shares of $50 each; that the capital stock of said Indianapolis and Cincinnati Railroad Company was $——, also divided into shares of $50 each; that the shares of the capital stock of each said corporation were by the charter thereof and the laws of said State under and declared to be personal property; that upon and after said consolidation of said companies, by operation of said laws, the shares of the capital stock of said consolidated corporation became and were personal prop-

erty; that on the 1st of January, 1867, said 84 shares of the capital stock of said Lafayette and Indianapolis Railroad Company held and owned by plaintiff were of the reasonable value in the market of $37 50 each, and no more; that in and by said articles of consolidation it was, among other things, stipulated and agreed by and between said two companies that they should intersect, join, and unite their said railroads at the city of Indianapolis, in said State, thus forming one continuous railroad between said city of Lafayette and the point of the southeastern terminus, on the State line of said Indianapolis and Cincinnati Railroad, passing through said city of Indianapolis, and that they should merge and consolidate the stock of said respective corporations, making one joint stock company of the two railroads thus connected, in accordance with the laws of said State; that said consolidated corporation should be known as the Indianapolis, Cincinnati, and Lafayette Railroad Company; that its capital stock should be fixed at the aggregate amount of the capital stock of said constituent corporations, divided into shares of fifty dollars each; that all the stock in said respective companies should become stock in the consolidated company by the mere force of said agreement, and that each stockholder in either having any number of shares should become stockholder with the same number of shares in the consolidated company. But it was therein further provided in substance and effect, that said consolidated corporation should immediately after its existence might

begin, issue and deliver to one William F. Reynolds, as agent and trustee in that behalf of said Layfayette and Indianapolis Railroad Company, and its stockholders, its corporate bonds to the aggregate amount of $2,500,000 secured by mortgage on the consolidated road and property; that said Reynolds should collect all claims due to said Lafayette and Indianapolis Railroad Company, and that out of such moneys and also out of said bonds or their proceeds he should pay, 1st, all the expenses incident to said trust; 2d, all debts or liabilities of every kind of said last-named railroad company; 3d, that the remainder thereof should be returned to said consolidated company, or paid over to the stockholders of said Lafayette and Indianapolis Railroad Company, at their option, upon the following conditions, viz: That all said stockholders, respectively, or any one or more of them, might, at his or their option, surrender his or their stock to said trustee for the benefit of said consolidatad company, and in lieu thereof receive from said trustee such proportion of said residue as the number of shares owned by any such stockholder should bear to the whole number of shares of stock. And it was further, by said articles provided, that said stockholders might have the space of one year from the time said consolidation should take effect within which to elect, to sell, and surrender their stock on the terms aforesaid, and that, failing within that time to make election to sell, they should be deemed to have elected to retain their stock in said consolidated corporation. That said

consolidation and the terms and conditions thereof were made in accordance with the assent previously given by said plaintiff; that after becoming a stockholder to the amount of 84 shares in said consolidated company by the operation of said articles and agreement of consolidation, to wit: on the 1st of August, 1867, said plaintiff elected to sell and surrender his said stock on the terms and conditions aforesaid, and thereupon surrendered his certificates therefor and received from said Reynolds, as such trustee, the said 21 bonds of said consolidated company, amounting in the aggregate to the said sum of $21,000, as and for a part of the sum to which he would be entitled under the arrangement aforesaid; that said 21 bonds were made payable to the bearer thereof, and were negotiable by delivery as according to the law merchant, and that they were so received by him in part payment for said stock, and as and for so much money, and that they were worth $15.750; that said plaintiff wholly failed to make to the proper assessor or assistant assessor of his said district, within the time prescribed by law, or at any other time, any return whatever of said gains and profits, or any part thereof, derived by him from said sale of stock; and that thereupon said assessor proceeded, as he was by law required to do, to assess the same, and did so assess the same, to wit: on the —— day of July, 1868, at the district aforesaid, which is the same supposed assessment in said declaration mentioned, and not other or different; that no part of said gains, profits, and income so re-

ceived by said plaintiff upon said sale and surrender of said stock had ever been assessed against said plaintiff or said railroad company, nor any tax paid thereon, except as the same was so assessed against said plaintiff, and by him paid, as in the declaration mentioned, &c.

Demurrer to second plea, and joinder.

Upon argument of the demurrer in the court below, it occurred as a question—

"Whether, if the plaintiff's stock in the Lafayette and Indianapolis Railroad Company, described in the declaration and plea, was, on the 1st day of January, 1867, worth only $37 50 per share, making his whole 84 shares thereof worth only $3,140, as alleged in said plea; and if the bonds mentioned in said plea, and therein alleged to have been received in said year for said stock, were, when the same were received, and within that year, worth $15,750, as alleged in the plea, ought the difference between said value of said stock and said value of said bonds, amounting to $12,610, to have been regarded as gain, profit, or income of the plaintiff, within the meaning of the internal revenue law in force when the tax mentioned in the declaration was assessed, so as to render said sum of $12,610, or any part thereof, taxable as income against the plaintiff."

On which question the opinions of the judges were opposed; whereupon it was, on motion, ordered that the question be certified to this court for its judgment and decision thereon.

I.

The internal revenue law relating to income taxation, in force when the tax mentioned in the declaration was assessed, is contained in the following provisions:

Section 13 of the act of March 2, 1867, amendatory

of sections 116, 117, 118, 119, and 123 of the act of June 30, 1864, (see 14 Stat., pp. 477 to 480.) Section 9 of the act of July 13, 1866, amendatory of sections 120 and 122 of the act of June 30, 1864, (see 14 Stat., pp. 138, 139.) And section 121 of the act of June 30, 1864, (see 13 Stat., p. 284.)

The act of 1867 declares: "That there shall be levied, collected, and paid annually upon the *gains, profits, and income* of every person * * * whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, * * * *or from any other source whatever*, a tax of five per centum on the amount so derived over one thousand dollars, &c. And the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said tax." (14 Stat., p. 478.)

The same law then enacts: "That, in estimating the gains, profits, and income of any person, there shall be included all income derived from interest upon notes, bonds, and other securities of the United States; profits realized within the year from sales of real estate purchased within the year, or within two years previous to the year for which income was [is] estimated; interest received or accrued upon old [all] notes, bonds, and mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectable, less

the interest which has become due from said person during the year; the amount of all premium on gold and coupons; the amount of sales of live stock, &c., being the growth or produce of the estate of such person, not including any part thereof consumed directly by the family; *all other gains, profits, and income derived from any source whatever*, except the rental value of any homestead used or occupied by any person or by his family in his own right or in the right of his wife; and the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same, if divided, whether divided or otherwise, except the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same," &c. (14 Stat., p. 478.)

It will be observed that the language employed by Congress is very comprehensive. The words *gains*, *profits*, and *income* were obviously used to give the act a more extended operation than it would have had, had either been omitted. They do not mean the same thing. Thus Webster defines *gain* to be: 1. That which is gained, obtained, or acquired, as profit or advantage; profit; advantage; benefit; winning;—opposed to *loss*. 2. The obtaining or amassing of profit or valuable possessions; acquisition; accumulation. He defines *profit* to be: 1. Acquisition beyond expenditure; excess of value received for keeping or selling, over cost; hence,

in commerce, pecuniary gain in any transaction or occupation; emolument. He defines *income* to be: 3. That gain which proceeds from labor, business, or property of any kind; the produce of a farm; the rent of houses; the proceeds of professional business; the profits of commerce or of occupation; the interest of money or stock in funds, &c.; revenue; receipts; especially, the annual receipts of a private person, or a corporation, from property; as, a large income, a limited income. To hold that each is the exact equivalent of the others, violates a recognized rule of construction, namely, to construe the section so that, if possible, no sentence, clause, or word shall be treated as superfluous, void, or insignificant. (Sedgwick on Stat. and Cons. Law, 238.) The terms of the act are sufficiently broad to include, as a taxable gain, the difference between the value of plaintiff's stock and the value of the bonds received by him therefor.

II.

Where the act specifies particularly what shall and what shall not be taxed, it is not easy to apply to it the ordinary rules of construction. Some of the items specified as matters that shall be taxed are so clearly within the provision that the tax shall be on all "gains, profits, and income," that it is difficult to imagine why they are specifically stated. The ordinary rule of construction would be that Congress understood that these matters would not be within the general provision of

the act, and would not have been the subjects of taxation, if they had not been specified. While, where the act declares that all "gains, profits, and income derived from every source whatever" shall be taxed, except the rental value of any homestead used or occupied by any person, or by his family, in his own right or in the right of his wife, it would, by the ordinary rule of construction, be held to imply that the rental value of the property thus occupied would be estimated as part of his income, and be taxable, if it were not for this provision. All that can be done, therefore, is to take into view the various provisions of the law, to which reference has been made, and determine from them its scope and meaning. That it was designed to be a searching law, reaching all the business transactions and property relations of the citizen, and fastening upon all his gains, profits, and income, however made and in whatever form obtained, is very manifest.

As to *personal property*, the gain must be acquired within the year for which the tax is imposed. Whether the gain may arise in any other way than upon a sale, or what is equivalent to it, need not be considered here, inasmuch as the pleadings show that in this case there was in effect a sale. The question is, whether a gain made during the year is taxable where the property sold or transferred was owned by the party at the beginning of the year. If a person, on the first day of the year, owns property worth $5,000, and he sells it during the year for $10,000, he has obviously made

a gain of $5,000. There is the substantial fact that he has gained $5,000; and this being ascertained, the act closes the door to any speculation as to how this result was accomplished by declaring that a citizen shall be taxed upon a gain *from any source whatever*.

No condition as to time of purchase is imposed respecting personal property; and the limitation as to real property cannot be extended by implication to personal property upon any recognized principle of interpretation. The mere fact that gains or losses on sales of real estate that have been held two years or more are made an exception to the general provision taxing all gains, profits, and incomes, while no such exception is made in respect of personal property, strengthens the inference that no such exception was intended. Accordingly, in assessing gains or profits made within the year on sales of personal property, no regard is to be had to the time when it was purchased.

It is the policy of the law to tax all substantial gains wherever they can be ascertained and estimated. Thus it unmistakably taxes dividends in scrip, interest that has not been received, a person's share of the profits of a company that have not been divided; and by implication it appears that, but for an exception in the law, a person would be taxed upon the rental value of his homestead used and occupied by himself, while another exception therein saves from taxation the value of his farm produce that his family has consumed.

III.

Counsel for plaintiff (in their brief) contend that the contract under which he received his bonds was in effect a sale of the corporate property of the Lafayette and Indianapolis Railroad Company for $2,500,000 of the bonds of the consolidated company, and that the dividend made to him was the share of that property represented by his stock—that the contract of consolidation set free the property of the first-mentioned company and divided it among the stockholders.

The Lafayette and Indianapolis and the Indianapolis and Cincinnati Railroad Companies consolidated on the 8th of January, 1867, and by the mere act of consolidation the stockholders in those companies became stockholders in the consolidated company. The plaintiff was, on the 1st of January, 1867, and on the day of the consolidation, a stockholder of the Lafayette Company, and by the operation of the articles of consolidation became a stockholder in the consolidated company. It is true the consolidation had the effect of dissolving the Lafayette Company, as also the Indianapolis Company; but it also brought into existence a new corporation, which gathered to itself all the property, rights, and stockholders of the corporations passing out of existence. There was no property of the Lafayette Company set free, no stock extinguished, no stockholders discharged, and no winding up and distribution of the assets of that company. The consolidation left no property of the Lafayette Company to

be sold or distributed, and no stockholders of that company to receive a distribution. Upon the dissolution of the constituent companies, the consolidated company took up their franchises and property and went on in the performance of its corporate functions, enjoying its corporate property and privileges.

The plaintiff, by the consolidation, became a stockholder in the consolidated company, and the articles of consolidation gave him the option to remain in that position or sell his stock to the consolidated company. He elected to sell on the 1st of August, 1867. The transaction which then took place was a sale in form and fact, and no other construction can be put upon it, having regard to the facts shown by the pleadings.

It is admitted by the demurrer that, on the 1st of January, 1867, the plaintiff owned 84 shares of stock, the market value of which was $37 50 each, or $3,150 in all; and that, after becoming a stockholder in the consolidated company to the amount of said stock, to wit, on the 1st of August, 1867, he transferred this same stock for bonds of that company, amounting in the aggregate to $21,000, but which were worth in the market only $15,750. This transaction certainly possesses as much the character of a sale as if the stock had been transferred to an individual instead of to the company mentioned, and the plaintiff had received in payment the promissory notes of the individual instead of the bonds of the company. In either case the transfer is for a *price*, namely, the amount of

money called for by the bonds or notes, though it is not payable until a future time, namely, when the bonds or notes mature; and the element of price distinguishes the transaction from a mere exchange, which it would be had the stock been transferred for stock or other property.

Here, then, by the sale of his bonds as aforesaid, a clear gain was obtained by the plaintiff during the year, which is capable of estimation, and which, as we think, is no more exempt from taxation under the law than would be the gains or profits arising from sales of any other description of personal property.

But the act of Congress does not limit the taxing power to the case of a sale. If it did, it would show that Congress had exhibited great care in closing the small cracks in the structure it had erected, and had left a door wide open. A person might exchange property for property, and, during the year, in a series of exchanges, accumulate a large fortune in such property as would readily enable his gains to be estimated, and yet escape taxation. Government bonds are not money. Can a man exchange these bonds for land, and land for bonds, until he has made a large fortune, and yet escape taxation? If not, how can he in similar operations with other kinds of property?

IV.

The plaintiff concedes a substantial gain of $12,600; and whether this gain was derived from a sale of his

stocks, or from an exchange of his stocks, or from "any source whatever," we submit that it is within the purview of the internal revenue law in force when the tax mentioned was assessed thereon.

B. H. BRISTOW,
Solicitor General.